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13
14 **UNITED STATES DISTRICT COURT**
DISTRICT OF NEVADA

15 APPLICATIONS IN INTERNET TIME, LLC,

16
17 Plaintiff,

18 v.

19 SALESFORCE.COM, INC.,

20 Defendant.
21

No. 3:13-CV-00628-RCJ-VPC

SALESFORCE'S OPPOSITION TO
AIT'S MOTION TO STRIKE
AMENDED INVALIDITY
CONTENTIONS

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4	35 U.S.C. § 112	5, 12, 15
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1 **I. INTRODUCTION**

2 AIT’s motion to strike Salesforce’s amended invalidity contentions should be denied. The
 3 motion conflicts with the Local Patent Rules and pertinent case law. Local Patent Rule 1-18a
 4 expressly provides for “Post-Claim Construction Amendment of Contentions” and states that
 5 “[w]ithin 30 days of a Claim Construction Order, the parties are to amend their disclosures
 6 accordingly, and include *any other amendments* to their disclosure at that time.” Salesforce
 7 plainly complied with this rule. AIT’s motion attempts to rewrite and ignore the plain language of
 8 the rule, relies on outdated and irrelevant case law, and clashes with its own amended
 9 infringement contentions. The motion should be denied.

10 ***First***, AIT is fundamentally wrong that LPR 1-18a requires good cause to amend the
 11 parties’ contentions. The rule itself, the commentary adopting the rule, and pertinent cases make
 12 clear the rule permits amendment as a matter of right. The Nevada Patent Local Rules, just as in
 13 the Western District of Texas, Northern District of Illinois, Eastern District of New York, and
 14 other districts courts, permit initial and final amended contentions as a matter of right. Only ***after***
 15 final amended contentions are served in these venues, just as here, must a party establish good
 16 cause to amend. *See* LPR 1-12 (“***Other than as provided in LPR 1-18a*** no other amendments to
 17 disclosures may be made other than as set forth herein ***absent a showing of good cause.***”).
 18 Accordingly, there is no basis to strike Salesforce’s Post-Claim Construction Amended
 19 Contentions, which were timely disclosed.

20 ***Second***, AIT is simply incorrect that Salesforce’s amended invalidity contentions are not
 21 based on the claim construction order. AIT does not dispute that the order was a proper basis for
 22 amendment, and in fact AIT too relied on the Court’s constructions to amend its own infringement
 23 contentions. Salesforce expressly responded to the Court’s construction of “automatically detect”
 24 for the vast majority of its contentions, just as AIT’s amended contentions repeatedly refer to this
 25 construction. Salesforce’s remaining challenged contentions also mirror AIT’s amended
 26 contentions—like AIT, Salesforce addressed the Court’s “plain and ordinary” construction of
 27 certain claim terms, including for “changes affecting” and “dynamically generate.”

1 *Third*, AIT does not, and cannot, point to *any* prejudice caused by Salesforce’s timely
 2 disclosed, Post-Claim Construction Amended Contentions. The amended contentions were
 3 disclosed on January 10 (pursuant to the parties’ agreement), nearly four months before the close
 4 of fact discovery, and more than five months before the deadline for opening expert reports.
 5 Consistent with the logical and orderly sequencing set forth in the Local Patent Rules, that is
 6 ample time for AIT to pursue any discovery that it believes is necessary to rebut or otherwise
 7 respond to Salesforce’s invalidity contentions. Moreover, AIT has acknowledged that it does not
 8 actually need any additional discovery to respond to Salesforce’s amended contentions, as it has
 9 not pursued any subpoenas or other discovery mechanisms in the intervening months.

10 Instead of articulating any basis for prejudice, AIT resorts to misrepresenting the record,
 11 characterizing a six-year stay as “years litigating” (Mot. at 10-11); incorrectly stating that
 12 Salesforce, and not RPX, “elected to pursue certain invalidity theories before the PTAB” (*id.* at
 13 11); and misrepresenting that Salesforce wants a “re-do of claim construction and discovery” (*id.*
 14 at 11). Worse yet, AIT waited for over two months after January 10 to bring this motion, but then
 15 points the blame at Salesforce that “there are a scant few weeks left in discovery.” Mot. at 11.
 16 Since the inception of this case, AIT has utterly failed to conduct fact discovery, having taken just
 17 one fact deposition and no third-party discovery. AIT’s failure to demonstrate any harm caused by
 18 Salesforce’s amended contentions, as opposed to its own delay, alone warrants denying the
 19 motion.

20 **II. BACKGROUND**

21 **A. The Amended Contentions Were Timely Served During Early Fact Discovery**

22 Salesforce served initial invalidity contentions on July 18, 2014, reserving its rights to
 23 supplement because “discovery has only recently begun” and “[p]rior art not included in this
 24 disclosure, whether known or not known to Salesforce, may become relevant.” Ex. 2, at 24:5-16,
 25 24:17-22¹. One month later, Salesforce filed covered business method review petitions with the
 26 PTAB challenging the validity of AIT’s patents, and the parties stipulated to a stay pending

27 ¹ Here and throughout the Opposition, “Ex.” refer to exhibits attached to the Declaration of
 28 Michael S. DeVincenzo In Support of AIT’s Motion, at Dkt. 186.

1 resolution of the CBMs. Dkt. 51. Seven months later, on April 27, 2015, the Court lifted the stay
2 after denial of Salesforce's petitions. Dkt. 58.

3 Three months later, on August 17, 2015, RPX Corporation filed three IPR petitions against
4 all asserted claims of AIT's patents. On June 14, 2016, the Court granted stay after the PTAB
5 instituted RPX's petitions for IPR. Dkt. 82. At that time, the Court observed that "[d]iscovery in
6 this case is not complete [because t]he parties agreed to wait until after the Court's Markman
7 decision to complete discovery." *Id.* at 6. The PTAB invalidated both AIT patents applying the
8 "broadest reasonable interpretation" of the patents on December 28, 2016; the Federal Circuit later
9 vacated these invalidity decisions as time-barred under its real-party-in-interest standard.

10 On March 2, 2021, the Court lifted the stay and set a claim construction hearing. *See* Dkts.
11 145, 149, 150. During the two stays, which lasted almost six years, no discovery was taken by
12 either party. Stake Decl. ¶¶ 8, 9.²

13 **B. AIT Represented that Amendments "Based on the Claim Construction**
14 **Order" Were Acceptable**

15 On November 9, 2021, the Court issued its claim construction order. Dkt. 172. The Court
16 construed "automatic detecting" as "detecting without human intervention through the use of one
17 or more intelligent agents," adopting elements of both parties proposed construction. *Id.* at 12.
18 The Court also adopted elements of both parties constructions of "layer" and "portions of a
19 server." *Id.* at 18-20. For "changes that affect" and "dynamically generate," the Court ruled that
20 no construction was necessary. *Id.* at 15.

21 Following the Claim Construction Order, the parties met and conferred in compliance with
22 LPR 1-18a and 1-19(a). Ex. 3 at 8-10. Salesforce explained that "given the impact of the Court's
23 Markman rulings on the parties' contentions" it "propose[d] a corresponding extension of
24 downstream deadlines including the close of fact discovery and the trial date." *Id.* at 7 (J. Judah
25 11/23/2021 email). Salesforce stated that its supplementation to contentions would "be in

26
27 ² Here and throughout the Opposition, "Stake Decl." and "Stake Ex." refer to the declaration
28 and exhibits attached to the Declaration of Sam Stake In Support Of Salesforce's Opposition To
AIT's Motion To Strike Amended Invalidity Contentions, filed concurrently herewith.

1 accordance with and as set forth in LPR 1-18a.” *Id.* at 3 (R. Zado 11/29/2021 email). AIT agreed
 2 to a three-week mutual extension, stating that “[w]e are willing to agree to an extension until
 3 January 10, 2022 for changes permitted under Local Patent Rule 1-18(a), i.e., *those based on the*
 4 *claim construction order.*” *Id.* (M. DeVincenzo 11/29/2021 email); *see also id.* at 6 (M.
 5 DeVincenzo 11/23/2021 email, stating “we would be amenable to three weeks as a courtesy to
 6 allow Salesforce to make any amendments necessitated by the claim construction ruling”).

7 **C. Both Parties Amended Their Contentions to Respond to the Claim**
 8 **Construction Order**

9 Both parties amended their post-*Markman* contentions on January 10 to respond to the
 10 Court’s claim construction order. AIT expanded its infringement contentions by well over 50%
 11 for asserted claims, and repeatedly referenced the Court’s claim construction order for expanded
 12 contentions. *Compare* Stake Ex. A at 1-42 *with* Stake Ex. C at 1-67 (showing a 60% increase in
 13 AIT’s infringement contentions for claim 1 of the ’482 Patent); Stake Ex. B at 48-83 *with* Stake
 14 Ex. D at 3-63 (showing a 75% increase in AIT’s infringement contentions for claim 13 of the ’111
 15 patent). AIT relied on the Court’s construction of “automatically detect” to accuse expansive new
 16 functionality in Salesforce’s products, such as “software components for declarative
 17 development,” “software component for org-driven development,” and “software components for
 18 source-driven development.” Stake Ex. B at 59-64; *see also id.* at 126-131; Stake Ex. D at 58-63.
 19 AIT also relied on the Court’s constructions for “layer” and “portion of the server” to accuse
 20 additional functionalities such as the “runtime engine.” For “dynamically generate,” AIT cited to
 21 the Court’s “plain and ordinary” determination in order to allege infringement by the new
 22 functionality, including “dynamic page rendering after an HTTP GET request” in Salesforce’s
 23 products. Stake Ex. B at 64-67; Stake Ex. D at 47-50.³

24 _____
 25 ³ In several other instances, AIT amended its contentions without any reference to the claim
 26 construction order at all. For example, AIT supplemented its infringement contentions to include
 27 reference to an entirely new component of Salesforce’s software – the Universal Data Dictionary
 28 (UDD). Stake Ex. B at 30-34. AIT described in several instances how the UDD maps to the
 elements of claim language without any reference to or reliance on the Court’s construction of the
 term. *Id.*

1 Salesforce also responded to the Court’s constructions with its amended invalidity
 2 contentions. For a full **16** of its 21 new prior art references, Salesforce contended that they
 3 disclosed “[a]utomatic detection of changes using intelligent agents,” as required by the Court’s
 4 claim construction of “automatically detect.” Ex. 1 at 40. Salesforce further responded to the
 5 Court’s “plain and ordinary” constructions by asserting four references from the IPRs that
 6 invalidated AIT’s patents under the “broadest reasonable interpretation” before the PTAB. *Id.* at
 7 26, 28. Salesforce also asserted additional Section 112 deficiencies arising from the Court’s broad
 8 construction of “changes that affect,” including for lack of enablement and written description. *Id.*
 9 at 56.⁴

10 **D. AIT Chose Not to Pursue Discovery, Despite Ample Time**

11 Following the service of the Amended Contentions, the parties met and conferred on
 12 January 18, 2022 regarding, among other issues, the appropriateness of each other’s contentions.
 13 Ex. 4 at 13. Salesforce explained that its amended contentions related to the claim construction
 14 order, including any additional prior art that was cited. Ex. 4 at 10-12. The parties then engaged
 15 in extensive email correspondence regarding their respective complaints about each other’s
 16 amendments, culminating in a meet and confer on February 14. Ex. 4 at 3-10. Throughout the
 17 written correspondence, Salesforce noted to AIT that:

- 18 • Salesforce’s amendments were proper even under AIT’s improper interpretation of
- 19 LPR 1-18a requiring good cause (*Id.* at 5, S. Stake 2/09/2022 email);
- 20 • Salesforce disagreed there was any “re-do” of Salesforce’s contentions, and
- 21 Salesforce’s supplementation was fully in accord with LPR 1-18a (*Id.* at 6, S. Stake
- 22 2/08/2022 email); and

23
 24
 25
 26 ⁴ Salesforce also asserted travel planning software system developed by ITA Software, Inc.
 27 and disclosed in U.S. Patent No. 6,307,572 (“’572 patent”). Salesforce asserted the ’572 patent in
 28 its initial invalidity contentions, and AIT highlighted travel planning applications at the claim
 construction hearing of its purported inventions. Ex. 2 at 26, Stake Ex. H at 9:5-11.

- AIT itself amended its contentions in view of the Court’s analysis of terms in the claim construction order, including where there was no explicit narrowing construction (*Id.* at 9, 1/21/2022 S. Stake email).

Salesforce next provided a proposed schedule for narrowing AIT’s asserted claims and its asserted prior art in advance of expert reports, including narrowing prior art references by nearly half. *Id.* at 3. On February 28, 2022 AIT rejected Salesforce’s proposed case narrowing, stating that instead it would move to strike Salesforce’s contentions. *Id.* at 1-2. AIT then delayed for several additional weeks prior to filing the instant motion, filing nearly two months after service of amended contentions. Fact discovery does not close until May 6 and opening expert reports are due on June 9. Dkt. 181. The Court has not set the hearing on summary judgment and Daubert motions, and the tentative trial date of March 2023 is subject to the convenience of the Court.

AIT has not been using this time to pursue discovery. To date, AIT has taken just one fact witness deposition, which AIT only conducted within this past month. By contrast, Salesforce has served multiple inventor and third-party prior art system subpoenas in preparation for expert reports. Stake Decl. ¶¶ 13, 14.

III. LEGAL STANDARD

Local Patent Rule 1-18a states “[w]ithin 30 days of a Claim Construction Order, the parties are to amend their disclosures accordingly, and include any other amendments to their disclosure at that time.” D. Nev. Loc. Pat. R. 1-18a.

The District of Nevada’s Local Patent Rules, “like their counterparts in other districts, seek to balance the right to develop new information in discovery with the need for certainty as to the legal theories.” *JS Prods., Inc. v. Kabo Tool Co.*, No. 2:11-CV-01856-RCJ-GWF, 2014 WL 1093107, at *3 (D. Nev. Mar. 19, 2014) (internal quotations omitted). “The law of the Federal Circuit controls for amending invalidity contentions because this issue is unique to patent cases and therefore has a close relationship to enforcement of substantive patent law.” *Return Mail, Inc. v. United States*, 152 Fed. Cl. 455, 459 (2021) (citations omitted). Enforcement of the Local Patent Rules lies within the Court’s discretion. *Genentech, Inc. v. Amgen, Inc.*, 289 F.3d 761, 774 (Fed. Cir. 2002).

1 **IV. AIT'S MOTION TO STRIKE SHOULD BE DENIED**

2 **A. AIT Is Mistaken That LPR 1-18a Requires Good Cause**

3 First, AIT's motion rests on the faulty premise that amended contentions under LPR 1-18a
 4 require good cause. LPR 1-18a calls for "Post-Claim Construction Amendment of Contentions"
 5 and is silent regarding good cause, instead requiring that amendments are made within a certain
 6 time from the Claim Construction Order and allowing the contentions to "include any other
 7 amendments." In contrast, LPR 1-12 reads "Other than *as provided in LPR 1-18a* no other
 8 amendments to disclosures may be made other than as set forth herein *absent a showing of good*
 9 *cause.*" Thus, the plain language of the rule makes it clear that LPR 1-18a, unlike LPR 1-12, does
 10 not require good cause.

11 The committee commentary adopting LPR 1-18a further demonstrates that the rule permits
 12 amendment as a matter of right. The District of Nevada adopted revised Local Rules of Practice
 13 for Patent Cases on April 17, 2020, and included LPR 1-18a for the first time. *See generally* Stake
 14 Ex. E. The committee's stated rationale for the rule was that "cases could be streamlined by
 15 requiring parties to *re-evaluate claims and prior art assertions* at this stage in the litigation." *See*
 16 Stake Ex. F at 5. The commentary is silent as to any good cause requirement for the newly-added
 17 LPR 1-18a. In contrast, for LPR 1-12, which requires good cause for other amendments to
 18 contentions, the commentary observes that "parties were using this relaxed phrasing [of the prior
 19 rule] to add extra unnecessary rounds of contentions *during the pre claim construction phase.*"
 20 *Id.* at 3 (emphasis added). The commentary thus makes clear that LPR 1-18a permits "any other
 21 amendments" as a matter of right.

22 The few Nevada cases which have addressed this rule since its adoption support this
 23 interpretation. In *Power Probe Group Inc. v. Innova Electronics Corp.*, the Court contrasted
 24 amendments under LPR 1-12 and LPR 1-18a. No. 2:21-CV-00332-GMN-EJY, 2021 WL
 25 5280651, at *2 (D. Nev. Nov. 12, 2021). The Court characterized LPR 1-18a as permitting parties
 26 to "amend their disclosures *without seeking leave of court* within 30 days of a court's claim
 27 construction order," contrasting it with LPR1-12 amendments that require "a showing of good
 28 cause." *Id.* Similarly, in *INAG, Inc. v. Richar, LLC*, cited by AIT, the Court observed that

1 defendant waived its LPR 1-18a amendment contentions, “which it could have done *as a matter of*
 2 *right* up to 30 days after entry of the Claim Construction Order.” No. 2:16-CV-00722-RFB-EJY,
 3 2021 WL 1582766, at *2 (D. Nev. Apr. 22, 2021) (emphasis added).

4 LPR 1-18a thus takes an approach similar to other jurisdictions providing for initial and
 5 post-*Markman* amended contentions as a matter of right. For instance, in the Western District of
 6 Texas, which currently has the highest volume of patent cases,⁵ Judge Albright’s standing order
 7 for patent cases expressly permits initial and post-*Markman* contentions without establishing good
 8 cause. *See* Stake Ex. G at 8, 9. Similarly, the Northern District of Illinois’ Patent Local Rule 3.1
 9 and Southern District of New York Local Patent Rule 9 permit post-claim construction amended
 10 invalidity contentions as a matter of right. *See* N.D. Ill. Pat. R. 3.1(b), S.D.N.Y. Loc. Pat. R. 9.
 11 Many other jurisdictions have similar provisions, allowing for both initial and final contentions,
 12 permitting amendments due to any new prior art found during intervening time as a matter of
 13 right. *See* E.D.N.Y. Loc. Pat. R. 9D; W.D.N.Y. Loc. Pat. R. 3.7; Utah Loc. Pat. R. 3.1; N.D. Ohio
 14 Loc. R. 3.10; M.D.N.C. Loc. Pat. R. 103.6(b)-107; E.D.N.C. Loc. Pat. R. 303.6; *see also*
 15 *Fresenius Med. Care Holdings, Inc. v. Baxter Int’l, Inc.*, No. C03-01431SBA(EDL), 2005 WL
 16 2043047, at *1 (N.D. Cal. Aug. 24, 2005) (rejecting argument that local patent rule permitting
 17 final amended contentions “should be read to require that any changes to a party’s Final Invalidity
 18 Contentions must be made in ‘good faith’ and must be ‘related to’ changes made by the patentee
 19 to its Final Infringement Contentions”).

20 The other Nevada cases cited by AIT (Mot. 9-11) also support Salesforce. *Linksmart*
 21 *Wireless Technology, LLC v. Caesars Entertainment Corp.* discusses the good cause standard
 22 under LPR 1-12, not under LPR 1-18a. No. 2:18-CV-00862-MMD-NJK, 2021 WL 201775, at *2
 23 (D. Nev. Jan. 20, 2021). There, plaintiff sought to amend its infringement contentions at the close
 24 of fact discovery, and thus did not qualify for LPR 1-18a. *Silver State Intellectual Technologies,*
 25

26 ⁵ Scott Graham, *Just 1 Judge Accounted for Nearly 25% of Patent Infringement Filings in*
 27 *2021, New Report Says*, Law.com (Jan. 4, 2022), available at
 28 <https://www.law.com/nationallawjournal/2022/01/04/just-one-judge-accounted-for-25-of-patent-infringement-filings-in-2021-new-report-says/>.

1 *Inc. v. Garmin International, Inc.* similarly concerns a previous version of the District of Nevada
 2 Local Patent Rules, *six years* before LPR 1-18a was adopted, and which at the time included an
 3 explicit good cause requirement. 32 F. Supp. 3d 1155, 1161 (D. Nev. 2014). AIT cites *Silver*
 4 *State* for the proposition that parties should provide “early notice of their invalidity contentions,”
 5 but the current operative District of Nevada Local Patent Rules structurally provide for and
 6 address this concern by providing for final amended contentions well before the close of fact
 7 discovery, similar to the structure of contentions in many other districts.

8 AIT’s other cases are also inapposite. AIT cites to out-of-district authority concerning
 9 patent local rules with express “good cause” standards for amending contentions. Like the court in
 10 *Simo Holdings Inc. v. Hong Kong uCloudlink Network Technology Ltd.*, this Court should find
 11 that “plaintiff’s citations to various decisions from other courts imposing a ‘good cause’ standard
 12 for supplementing invalidity contentions are inapposite,” when there is no such local rule standard
 13 here. 354 F. Supp. 3d 508, 510 (S.D.N.Y. 2019). For instance, the standard to modify invalidity
 14 contentions in *Willis Electrics Co. v. Polygroup Macau Ltd.*, (Mot. at 10) is radically different
 15 than LPR 1-18a: “the proponent of the motion must demonstrate three things: (1) that the
 16 proposed additional references ‘were not, and could not reasonably have been, located earlier’; (2)
 17 the proposed references are not cumulative of prior art already included in the statement; and (3)
 18 the proponent’s prejudice if leave is denied outweighs the prejudice that the non-moving party
 19 would face if the motion was granted.” No. 15-CV-3443- WMW-KMM, 2019 WL 5541407, at *2
 20 (D. Minn. Oct. 28, 2019).

21 Similarly, *U.S. Well Services, LLC v. TOPS Well Services* (Mot. at 9-10) concerns
 22 amendments submitted under a “good cause” standard during the parties’ claim construction
 23 briefing. No. 3:19-CV-00237, 2020 WL 5554022, at *1-4 (S.D. Tex. Sept. 16, 2020).⁶ In *Uniloc*
 24

25 ⁶ By contrast, in *Sandbox Logistics LLC v. Proppant Express Investments. LLC*, the same
 26 district court as *U.S. Well* found that Defendant can amend invalidity contentions based on another
 27 analog of LPR 1-18a. No. 3:16-CV-12, 2018 WL 6191044, at *1 (S.D. Tex. Nov. 28, 2018). The
 28 court did not reach the issue of whether this rule contained a responsiveness requirement, because
 plaintiff could show no prejudice where the plaintiff should have known about some of the
 amendments from IPR and there was three weeks until the invalidity expert deposition. *Id.* at *2.

1 *2017 LLC v. Google LLC*, where the local rules required “good cause” and no prejudice, unlike
 2 here, the court found that the supplemental prior art was not important where defendant had
 3 already disclosed 348 combinations and the defendant did not “adequately identify any disclosure
 4 in the new information that is distinct from Google’s already-identified prior art.” No. 2:18-CV-
 5 00503-JRG-RSP, 2020 WL 709557, at *3 (E.D. Tex. Feb. 10, 2020).⁷ Another AIT case, *Contour*
 6 *IP Holding, LLC v. GoPro, Inc.* concerns a different N.D. Cal. patent local rule requiring “good
 7 cause,” and amended contentions after final contentions had already been served. No. 3:17-CV-
 8 04738-WHO, 2020 WL 109063, at *2 (N.D. Cal. Jan. 9, 2020).⁸ *Digital Ally, Inc. v. Taser*
 9 *International, Inc.* (Mot. at 10) is likewise distinguishable. There, the defendant was previously
 10 granted leave to amend their contentions, and made a second request to amend which was
 11 submitted after fact discovery closed. No. 16-2032-CM-TJJ, 2018 WL 5620654, at *2 (D. Kan.
 12 Oct. 30, 2018).

13 AIT’s other cited Texas, Kansas, and Minnesota cases (Mot. at 13) are similarly inapposite
 14 due to their application of express good cause standards under different patent local rules. *See,*
 15 *e.g., Nike, Inc. v. Adidas Am. Inc.*, 479 F. Supp. 2d 664, 667 (E.D. Tex. 2007) (applying local rule
 16 allowing amendment where party believes in “good faith that the Court’s Claim Construction

17 ⁷ Applying the same rule in the same district, the Court in *GREE, Inc. v. Supercell Oy*
 18 permitted amendment, finding that where Defendant’s understanding of a key term was narrower
 19 than the Court’s final construction, it necessitated supplementation with additional, broader, prior
 20 art references, and where Plaintiff waited three months from the service of the contentions until
 21 bringing the motion to strike, there was no prejudice. No. 2:19-CV-00237-JRG-RSP, 2020 WL
 22 5747843, at *2 (E.D. Tex. Sept. 24, 2020); *see also Rembrandt Wireless Techs., LP v. Samsung*
Elecs. Co. Ltd., No. 2:13-CV-213-JRG-RSP, 2015 WL 1848524, *2 (E.D. Tex. 2015) (rejecting
 23 motion to strike where Plaintiff “waited—more than two months later—to formally raise its
 24 objections to Defendants’ subsequently amended invalidity contentions. It then waited an
 25 additional three weeks, to file the instant motion”).

26 ⁸ By contrast, in *Google LLC v. Sonos, Inc.*, the court applied the same rule as *Contour* but
 27 allowed amendment because “it is generally permissible for a party to amend its invalidity
 28 contentions in response to the patentee amending its infringement contentions.” No. 20-CV-
 03845-EMC (TSH), 2021 WL 4061718, at *4 (N.D. Cal. Sept. 7, 2021) (citations omitted); *see*
also Cellspin Soft, Inc. v. Fitbit, Inc., No. 17-CV-05928-YGR (KAW), 2021 WL 4923370, at *3
 (N.D. Cal. Aug. 10, 2021) (finding good cause to amend and no prejudice under the same rule in
 the same district where, among other issues, “Defendants provided their final draft of the proposed
 amendments two months prior to the current fact discovery deadline, such that Plaintiff had the
 opportunity to conduct fact discovery as to the prior art”).

Ruling so requires”); *CommScope Techs. LLC v. Dali Wireless, Inc.*, No. 3:16-CV-0477-M, 2018 WL 4566130, at *3 (N.D. Tex. Sept. 21, 2018) (applying local rules under which “a party may not amend infringement contentions without leave of court unless the court adopts unexpected or unforeseeable claim constructions”); *No Spill, LLC v. Scepter Candada, Inc.*, No. 2:18-CV-2681-HLT-KGG, 2021 WL 5232312, *2–3 (D. Kan. Nov. 10, 2021) (same); *Patent Harbor, LLC v. Audiovox Corp.*, No. 6:10-CV-00361 LED-JDL, 2012 WL 12840341, at *2 (E.D. Tex. Mar. 30, 2012) (same).

Finally, AIT’s statement that “the purpose of LPR 1-18a amendments is to ‘reasonably limit the number of claims and prior art references asserted’” is also erroneous. Mot. at 12. LPR 1-18a requires the parties to meet and confer within 14 days of the *Markman* order to “limit the number of claims and prior art references asserted,” and *separately* permits the parties “*any other amendments* to their disclosure.” LPR 1-18a. The Rule thus has two separate components: (1) a meet and confer on claim and prior art narrowing; (2) “any other” post-*Markman* amendments, i.e., without any good cause requirement.⁹

B. Salesforce’s Amended Invalidity Contentions Respond to the Claim Construction Order, Which AIT Agreed Is “Good Cause”

Salesforce’s amended invalidity contentions are entirely proper, at a minimum, because they address the Court’s claim construction order, which AIT agreed was a proper basis for amendment. Salesforce expressly tied the vast majority of its supplemental prior art to the Court’s construction of “automatically detect.” See e.g., Ex. 1 at 40-47 (new references specifically addressed to “automatic detection of changes using intelligent agents”). Other amendments by Salesforce addressed key prior art from the IPRs under the Court’s broad “plain and ordinary” constructions of other terms. In fact, AIT *does not dispute* that the prior art references that Salesforce added are tied to the claim construction order. See generally Mot. at 9-11. AIT instead complains about the number of references added in the amendment and vague allegations of a “re-

⁹ The parties did not reach agreement during meet and confer on claim or prior art narrowing. On February 23, Salesforce proposed a schedule for significant claim and prior art narrowing, including to reduce the amount of asserted prior art by nearly half at the end of expert discovery. Ex. 4 at 3.

1 do of claim construction,” even though AIT fails to articulate any impact of Salesforce’s
2 amendments on the Court’s claim constructions. Mot. at 11.

3 AIT’s argument that “Salesforce’s new invalidity defenses under § 112 are not based on
4 any of the Court’s claim constructions” (Mot. at 14) is also misplaced. AIT objects in particular to
5 Salesforce’s written description and enablement positions for the terms “the third portion,” “the
6 fourth portion,” “a change management layer,” and “automatically detecting changes.” *Id.* But all
7 of these terms were at issue during claim construction proceedings, and the Court provided
8 explicit constructions of these terms or portions of them. Dkt. 172 at 24 (providing constructions
9 of “automatic detect[ing],” “layer,” and “portion of the server.”). Salesforce’s enablement and
10 written description positions are therefore also responsive to the Court’s claim construction order
11 and therefore permissible.

12 AIT’s correspondence with Salesforce before the parties served their respective
13 contentions, and its own amended infringement contentions, confirms the claim construction order
14 provides a permissible basis for amendment. In that correspondence, AIT expressly agreed and
15 represented that the parties’ amended contentions can include changes “based on the claim
16 construction order.” Ex. 3 at 3 (M. DeVincenzo 11/29/2021 email); *see also id.* at 6 (M.
17 DeVincenzo 11/23/2021 email, stating “we would be amenable to three weeks as a courtesy to
18 allow Salesforce to make any amendments necessitated by the claim construction ruling”). AIT
19 then extensively amended its infringement contentions by relying on the claim construction order
20 (*supra* at 4-5), and Salesforce reasonably relied on AIT’s representations in addition to relying on
21 the plain language of LPR 1-18a for its own amendments. It is improper for AIT to now try to
22 strike based on a good cause standard when AIT’s own position—along with numerous courts
23 applying a “good cause” standard—that the claim construction order provided good cause. *See,*
24 *e.g., GPNE Corp. v. Apple Inc.*, 2013 WL 6157930, at *2 (N.D. Cal. Nov. 22, 2013) (“GPNE
25 could not have anticipated the full scope of the amendments needed without the court’s claims
26 construction order before it.”); *accord Kinglite Holdings Inc. v. Micro-Star Int’l Co.*, No.
27 CV1403009JVSPJWX, 2015 WL 6437836, at *3 (C.D. Cal. Oct. 16, 2015) (“Kinglite still
28 establishes its diligence in trying to amend its infringement contentions after the Court’s Claim

1 Construction Order. The Court's adoption of differing constructions from those proposed by
 2 Kinglite gives rise to good cause because those differences are material to Kinglite's theory of
 3 infringement.”); *Apple Inc. v. Samsung Elecs. Co.*, No. 12-CV-0630-LHK PSG, 2013 WL
 4 3246094, at *9 (N.D. Cal. June 26, 2013) (“[T]he court finds that the claim construction order
 5 provides good cause for the proposed amendments...”); *CellCast Techs., LLC v. United States*,
 6 152 Fed. Cl. 414, 426 (2021) (agreeing that “the Claim Construction Order triggered the new
 7 search for prior art by the Defendants”).

8 AIT’s various arguments that the Court’s constructions were not “unexpected or
 9 unforeseeable” or that Salesforce lacked “diligence” are all variations on AIT’s misplaced
 10 application of “good cause” standards. (Mot. at 13). AIT does not dispute that the challenged
 11 amended contentions were “based on the claim construction order” (Ex. 3 at 3), consistent with its
 12 prior representations, but instead seeks to impose additional requirements on Salesforce. As
 13 discussed above, AIT improperly takes these additional requirements from inapposite case law
 14 applying express “good cause” rules for amending contentions. *Supra* at § IV.A. Accordingly,
 15 Salesforce’s amended contentions were proper and AIT’s motion should be denied.

16 C. AIT Points To No Prejudice From The Amended Invalidity Contentions

17 Also fatal to AIT’s misguided “good cause” arguments, AIT has failed to demonstrate any
 18 prejudice resulting from Salesforce’s amended invalidity contentions. *See Asyst Techs., Inc. v.*
 19 *Empak, Inc.*, No. C 98-20451 JF, 2006 WL 3302476, at *7 (N.D. Cal. Nov. 14, 2006) (permitting
 20 invalidity contention amendments where plaintiff “has not identified any particular prejudice it
 21 will suffer if [defendant] is permitted to amend its invalidity defenses and contentions”); *Auto.*
 22 *Data Sols., Inc. v. Directed Elecs. Canada, Inc.*, No. CV 18-1560-GW(Ex), 2019 WL 4565170, at
 23 *2 (C.D. Cal. Aug. 9, 2019) (“Plaintiff’s conclusory assertion that discovery ‘may’ need to be
 24 reopened, without specific examples of what aspects of Defendants’ amended infringement
 25 theories would require it, does not support undue prejudice.”). When Salesforce served its
 26 amended contentions on January 10, nearly four months remained in fact discovery and more than
 27 six months remained before AIT’s rebuttal expert report on invalidity. Over 16 weeks of fact
 28 discovery was more than ample time for AIT to pursue any discovery it believed was necessary to

1 rebut or otherwise respond to Salesforce’s invalidity contentions. AIT, however, has not pursued
2 any subpoenas or other discovery mechanisms in the intervening months, and has not
3 demonstrated any specific prejudice for its experts, its trial preparation, or for any other facet of its
4 case.

5 AIT instead resorts to misrepresenting the record. Contrary to AIT’s argument, there was
6 no discovery happening during the near six-year stay. *See* Mot. at 10 (characterizing a six-year
7 stay as “years litigating”); *id.* at 8 (characterizing it as “eight years ... engaged in claim
8 construction and discovery”), *compare with* Stake Decl. ¶¶ 11, 12. This fact weights against any
9 prejudice from the amended invalidity contentions. *See THX, Ltd. v. Apple, Inc.*, No. 13-CV-
10 01161-HSG, 2016 WL 1718137, at *2 (N.D. Cal. Apr. 29, 2016) (“THX’s proclamation that
11 Apple delayed seeking further discovery from Onkyo for ‘almost two years’ oddly ignores the fact
12 that this action was stayed.”)

13 AIT’s own dilatory efforts to conduct discovery further undermine AIT’s prejudice
14 arguments. *See, e.g., JS Prod., Inc. v. Kabo Tool Co.*, No. 2:11-CV-01856-RCJ, 2014 WL
15 1093107, at *7 (D. Nev. Mar. 19, 2014) (finding that Plaintiff “has failed to identify any specific
16 prejudice that could not have been cured through additional discovery” where Plaintiff “chose not
17 to initiate any discovery related to any of the [supplemental prior art and] [i]nstead, and in
18 response to [defendant’s] good faith invitation to conduct additional discovery related to the
19 supplemental contentions, [plaintiff] informed [defendant] that it would file the instant motions to
20 strike”). AIT waited almost 2.5 months since the service to bring the instant motion. AIT has not
21 pursued any third party discovery despite the multiple prior art systems Salesforce has disclosed, it
22 has taken only one deposition (unrelated to any issues raised in Salesforce’s final invalidity
23 contentions). That AIT failed to take any action against the so-called “prejudice” it alleges is
24 another basis to deny relief.

25 AIT attempts to argue prejudice based on out-of-district cases with inapposite local rules
26 and facts. In *MorphoTrust USA, LLC v. United States*, the defendant sought to amend its
27 contentions in violation of a deadline set by the case schedule by arguing that “the deadline was
28 more suggestive than definite” since “the court is always free to reopen the issue of claim

1 construction at later stages in the litigation.” 132 Fed. Cl. 419, 420 (2017). Salesforce’s
2 amendments were timely, and Salesforce is not requesting to re-open claim construction.
3 Similarly, *Imperium IP Holdings v. Samsung Elecs. Co.* and *Allure Energy, Inc. v. Nest Labs, Inc.*
4 both concern inapplicable local rules that permit amendments “only by order of the court, which
5 shall be entered only upon a showing of good cause,” and where good cause is established based
6 on five nonexclusive factors. *Imperium IP Holdings v. Samsung Elecs. Co.*; No. 4:14-CV-371,
7 2016 WL 3854700, at *1 (E.D. Tex. Mar. 28, 2016); *Allure Energy, Inc. v. Nest Labs, Inc.*, 84 F.
8 Supp. 3d 538, 540-541 (E.D. Tex. Mar. 24, 2015). Neither this rule nor these factors are
9 applicable here, where Salesforce amended its contentions as a matter of right under the Nevada
10 Patent Local Rules.

11 AIT similarly fails to explain why Salesforce’s amendments “would almost certainly
12 require a new claim construction hearing and yet a third round of briefing” (Mot. at 11), and again
13 reveals its persistent misunderstanding of the Local Patent Rules. LPR 1-18a explicitly permits
14 amendments that address, among other things, the claim construction order and newly discovered
15 prior art, and is meant to streamline a case, not generate further briefing. In addition to different
16 local rules, *MASS Engineered Design, Inc. v. Ergotron, Inc.* concerned a motion to serve amended
17 invalidity contentions post-*Markman* where defendant failed to serve any initial invalidity
18 contentions entirely and did not include invalidity as a defense in its answer. 250 F.R.D. 284, 286
19 (E.D. Tex. 2008).

20 AIT’s prejudice arguments regarding Salesforce’s amended 35 U.S.C. § 112 theories fail
21 for similar reasons: (1) LPR 1-18a applies, (2) even if it does not, Salesforce’s amendments
22 properly responded to the claim construction order, and (3) AIT fails to identify any specific
23 prejudice arising from these theories. *See, e.g., Treehouse Avatar LLC v. Valve Corp.*, No. C17-
24 1860-RAJ, 2020 WL 2800723, at *2 (W.D. Wash. 2020) (granting leave to serve amended
25 invalidity contentions to add written description and enablement invalidity contentions based on
26 the court’s recent claim construction); *Celgene Corp. v. Natco Pharma Ltd.*, No. 10-5197
27 (SDW)(SCM), 2015 WL 4138982, at *3-*5 (D.N.J. July 9, 2015) (permitting accused infringer to
28 amend its invalidity contentions and add § 112 defenses, where the amendment was sought 23

1 days after the court had issued its claim construction order that had adopted plaintiff's proposed
2 construction).

3 **V. THE COURT SHOULD STRIKE AIT'S AMENDED INFRINGEMENT**
4 **CONTENTIONS IN THE ALTERNATIVE**

5 AIT's motion should be denied for all of the foregoing reasons. AIT applies an erroneous
6 "good cause" standard, ignores the plain language of LPR 1-18a, cites inapposite case law, and
7 ignores its prior position that the Markman order provided good cause for amendment—all of
8 these provide ample basis to deny AIT's motion. However, if the Court were to apply AIT's
9 "good cause" standard and entertain the possibility that Salesforce somehow failed to meet that
10 standard, AIT's own voluminous amendments to its infringement contentions on January 10, 2022
11 violate the unjustifiably restrictive standard AIT seeks to impose, and should be stricken.

12 Before serving its amended contentions, AIT argued that the Court's constructions should
13 have a "rather limited impact" on the parties' contention. Dkt. 186, Ex. 3. Yet, when it served its
14 contentions soon after, AIT expanded its contentions for its asserted claims by several dozen
15 pages, including by roughly 60% for claim 1 of the '482 patent and 75% for claim 13 of the '111
16 patent. *Compare* Stake Ex. A at 1-42 *with* Stake Ex. C at 1-67 (showing a 60% increase in AIT's
17 infringement contentions for claim 1 of the '482 Patent); Stake Ex. B at 48-83 *with* Stake Ex. D at
18 148-210 (showing a 75% increase in AIT's infringement contentions for claim 13 of the '111
19 patent). Like Salesforce, AIT cited the Court's Markman order as a purported basis for its
20 amendments, including for all new components and functionalities (indicated below):

- 21 • "layer"/ "portion of the server" (Ex. C at 29-33, 37-38, 43-50, 54-57; 95-99; 104-105;
22 114-121; Ex. D at 13-17, 24-25; 40-46; 54-57)
 - 23 ○ "Universal Data Dictionary"
 - 24 ○ "Base Platform Objects," "custom object (virtual database tables)," and "custom
25 fields (virtual database columns)"
- 26 • "automatic detect[ing]" (Ex. C at 54-57; 58-63; 125-130; Ex. D at 58-63)
 - 27 ○ "software components for declarative development (e.g., Change Sets, Setup Audit
28 Trail)"

- “software components for org-driven development (e.g., Developer Sandbox, Sandbox Refresh, Developer Edition Orgs, Scratch Orgs, Migration Tool, Force.com IDE, Metadata API, Tooling API...)”
- “software components for source-driven development (e.g., Web IDE, Salesforce Developer Experience (DX), DX Source Tracking, DX Continuous Integration/Continuous Delivery/Continuous Deployment, CLI Interface...)”
- **“dynamically generate[d]” (Ex. C at 64-67; 131-134; Ex. D at 47-50)**
 - “dynamic page rendering after an HTTP GET request”
- **“business content database” (Ex. C at 135-136)**
 - “Universal Data Dictionary”
 - “custom objects (virtual database tables)”
 - “custom fields (virtual database columns)”

AIT’s own assertion that, in its view, the Court’s constructions of these terms had a “rather limited impact” (Salesforce does not agree) directly undercuts any possible claim that its amendments to its infringement contentions comply with its proposed good cause standard. Indeed, AIT manifestly cannot show that it exercised any “diligence” in supplementing its contentions. Long before AIT’s contentions, Salesforce published voluminous documentation on its website describing the new components and functionalities above, including through help.salesforce.com, developer.salesforce.com, and trailhead.salesforce.com. See, e.g., https://developer.salesforce.com/wiki/multi_tenant_architecture (Universal Data Dictionary); <https://help.salesforce.com/s/articleView?id=sf.changesets.htm&type=5> (Change Sets); https://help.salesforce.com/s/articleView?id=sf.admin_monitorsetup.htm&type=5 (Setup Audit Trail); https://trailhead.salesforce.com/content/learn/modules/data_modeling/objects_intro (Custom Objects); https://developer.salesforce.com/docs/atlas.en-us.apexcode.meta/apexcode/apex_intro_get_dev_account.htm (Developer Sandbox); https://developer.salesforce.com/docs/atlas.en-us.api_meta.meta/api_meta/meta_intro.htm (Metadata API). Moreover, Salesforce had produced extensive technical documentation and had made source code for the accused products available for inspection by April 2021. Nevertheless,

1 AIT did not make any attempt to amend its contentions until January 10, 2022. Indeed, AIT did
2 not even notice the deposition of a single Salesforce witness, much less conduct any deposition,
3 until well after the final contention deadline had passed. Accordingly, to the extent that the Court
4 were to apply AIT's proposed overly narrow reading of the "good cause" standard for
5 supplementation of contentions, the Court should strike AIT's amendments to its final
6 infringement contentions.

7
8 DATED: March 30, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that I am an employee of Quinn Emanuel Urquhart & Sullivan LLP and that pursuant to LR 5-3 I caused to be electronically filed on this date a true and correct copy of the foregoing document with the Clerk of the Court using the CM/ECF system which will automatically e-serve the same on the attorney set forth below:

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